Supreme Court, U.S.
FILED
FEB 20 1991
OFFICE OF THE CLERK

(3)

No. 90-1114

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

EDMUND J. BODINE, JR.,

Petitioner,

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD INVOKE ITS DISCRETIONARY JURISDICTION WHERE THE SEVENTH AMENDMENT ISSUE SOUGHT TO BE REVIEWED IN THE PETITION IS EXCEPTIONAL AND REOCCURRING IN NATURE?

II.

WHETHER THE ELEVENTH CIRCUIT EXCEEDED ITS APPELLATE POWERS IN REVIEWING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR REMITTITUR WHERE SUCH REVIEW IS CONSTITUTIONALLY PRECLUDED BY THE SEVENTH AMENDMENT?

III.

REGARDLESS OF THE SEVENTH AMENDMENT ARGUMENT, WHETHER THIS COURT SHOULD INVOKE ITS DISCRETIONARY JURISDICTION WHERE THE COURT OF APPEALS ARBITRARILY REDUCED THE PLAINTIFF'S PAIN AND SUFFERING DAMAGES FROM $2,000,000.00 TO $1,000,000.00 WITHOUT EXPLANATION IN VIOLATION OF *GRUENTHAL V. LONG ISLAND R. CO.*, 393 U.S. 156 (1968)?

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REPLY BRIEF OF PETITIONER

Petitioner, Edmund J. Bodine, Jr., respectfully submits his Reply Brief to the Respondent's Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner.

STATEMENT OF THE CASE

Petitioner relies on his statement of the case filed in his Petition with the following additions in response to the Respondent's brief:

1. Although nearly three and one-half years expired from the filing of the lawsuit in December of 1985 until the trial in March of 1989, the Respondent never requested an independent medical examination of Mr. Bodine regarding his emotional trauma

although he had been seen by Dr. Sprehe, with the Respondent's knowledge, since January of 1987.

2. Regarding Respondent's statements concerning the fact that Mr. Bodine did not see Dr. Sprehe until January of 1987, Dr. Sprehe testified at the trial that such a situation was not unusual. Dr. Sprehe stated:

> It is not unusual at all for people who have traumatized and had that trauma cause them a psychological problem, for them to lack the insight to realize themselves that they could use psychiatric treatment. For that matter, it is not unusual for many people walking the street out there who very much need psychiatric treatment to not be willing to admit it themselves. So it just took Mr. Bodine this long a time to realize that he has got to get some professional help for his emotional problem.

3. Regarding Respondent's argument that Kemper is not fully responsible for Mr. Bodine's damages, Dr. Sprehe stated that the failure to cancel the insurance policy:

> (G)reatly expanded (Mr. Bodine's) notion of the massiveness of the plot against him, in that he thought at the time, in his mind, that there was involvement of high officials within this insurance company that would keep the motivation for him being killed alive.... He was very frightened already...but then this really terrified him, and he thought that this was a much broader plot because of their refusal to cancel the insurance policy.

4. Finally, the Respondent has resorted to surmising that Mr. Bodine "overheard a bench conference" as the basis for him testifying regarding his physical impairment. Respondent's Brief in Opposition at 4. Obviously, there is no evidence of Mr. Bodine overhearing anything and using such speculation as a basis for a remittitur is non-meritorious.

REASONS WHY THE PETITION SHOULD BE GRANTED

I.

THE SEVENTH AMENDMENT ISSUE SOUGHT TO BE REVIEWED IN THE PETITION IS EXCEPTIONAL AND REOCCURRING IN NATURE AND SHOULD BE CONSIDERED ESPECIALLY SINCE THIS COURT HAS GRANTED CERTIORARI PREVIOUSLY.

As this Court stated in *Duignan v. United States,* 274 U.S. 195, 200 (1926):

> It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.

However, the Supreme Court has exercised that exceptional power several times to consider important issues. *Youakim v. Miller,* 425 U.S. 231, 234 (1976) (possible conflict between the Illinois foster care program and the Social Security Act was considered based on the Supremacy Clause which had not been raised in the District Court or in the Appellate Court); *Carlson v. Green,* 446 U.S. 14 (1980) (issue raised for the first time in petition for writ of certiorari as to whether a cause of action may have arose under the Federal Tort Claim Act where the decedent failed to receive proper medical treatment in federal prison; *Boynton v. Commonwealth of Virginia,* 364 U.S. 454 (1960) (issue considered as to impact of the Interstate Commerce Act where the petition for writ of certiorari presented issues regarding due process).

In *Boynton,* the Court stated:

> We think. . . that the claims of discrimination previously made under the Act are sufficiently closely related to the assignments that were made to be considered within the scope of the issues presented. . .

Boynton, supra, at 457.

Likewise, in *Carlson*, the Court stated regarding the F.T.C.A. claim:

> This question was presented in the petition for certiorari, but not in either the District Court or the Court of Appeals . . . It is an important, reoccurring issue . . . We conclude that the interest of judicial administration will be served by addressing the issue on its merits.

Carlson, supra, at 17 n.2.

In the present case, it is obvious that the alleged violation of the Seventh Amendment by allowing the Court of Appeals to remit damages and, thereby override the trial court and jury's decision, is an "important, recurring issue" especially since this Court has already granted certiorari on three prior occassions on this issue. *See, Browning-Ferris Industries v. Kelco Disposable, Inc.*, 492 U.S. ____, 109 S.Ct. 2909, 2922 n.25 (1989); *Neese v. Southern R.Co.*, 350 U.S. 77 (1955); *Grunenthal v. Long Island R. Co.*, 393 U.S. 156 (1968).

Likewise, the Seventh Amendment argument is "closely related" to the abuse of discretion argument which the respondent acknowledges has been properly preserved for this appeal. In fact, all three Supreme Court cases cited above avoided the Seventh Amendment question by determing that the trial court did not abuse his discretion in denying the granting of a new trial or remittitur in each case. *Browning-Ferris Industries, supra,* at 2922 n.25.

II.

THE ELEVENTH CIRCUIT EXCEEDED ITS APPELLATE POWERS IN REVIEWING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR REMITTITUR BECAUSE SUCH REVIEW IS CONSTITUTIONALLY PRECLUDED BY THE SEVENTH AMENDMENT.

The Petitioner relies on his argument I in his Petition in response to Respondent's argument II.

III.

REGARDLESS OF THE SEVENTH AMENDMENT ARGUMENT, THE COURT OF APPEALS ARBITRARILY REDUCED THE PLAINTIFF'S PAIN AND SUFFERING DAMAGES FROM $2,000,000.00 TO $1,000,000.00 WITHOUT EXPLANATION IN VIOLATION OF *GRUNENTHAL V. LONG ISLAND R. CO.*, 393 U.S. 156 (1968).

In Respondent Kemper's opposition brief, the Respondent attempts to justify the Eleventh Circuit's remittitur by using its own arguments as a substitution for substantive evidence. The Eleventh Circuit stated:

> *Kemper argues* that the verdict in the amount of $2,000,000.00 for pain and suffering was so excessive as to require a remittitur. *Kemper argues* that ... Bodine was aware that the policy had been cancelled by February 28, 1984. *Kemper also argues* that much of Bodine's anxiety was necessarily caused by the murder plot itself, rather than by Kemper's alleged negligence in failing to cancel the policy. (A. 9). (Emphasis added).

What the Respondent has failed to mention is that its arguments were not substantiated by evidence. Specifically, as the Petitioner has already noted in his Petition, the only evidence regarding Mr. Bodine's pain and suffering was presented by the Plaintiff himself and by Dr. Daniel Sprehe. While Kemper "argued" they were not responsible for all of Mr. Bodine's anxiety, it presented no evidence to delineate the damages caused by the murder plot itself from the damages caused by Kemper's failure to cancel the policy. Consequently, it was reasonable for the jury to determine, and for the trial court to agree, that Kemper was responsible for Mr. Bodine's pain and suffering damages.

In *Grunenthal v. U.S.*, the Supreme Court found that the Second Circuit's relevant discussion of remittitur was insufficient

to overturn the trial judge's denying of the remittitur. However, the Second Circuit discussed and considered much more evidence regarding pain and suffering damages than the Eleventh Circuit did in this case. Specifically, the Second Circuit stated:

> Grunenthal was a track worker assigned as acting foreman to the task of directing the removal of the timber tie. He was 45 at the time of the trial, with a life expectancy of 27 years. He had worked as a laborer or trackman for the Railroad during his entire mature life and was receiving, including overtime from $5,600 to $6,000 a year.
>
> His right foot was crushed by the impact of the heavy timber tie. The compound fracture involved the instep, the great toe joint and the second metatarsal. He was hospitalized on five separate occasions covering a total of 78 days between September 1962 and June 1964. There were several operations, including one of skin grafting and another "right sympathectomy." At one time there was danger that gangrene would develop. During all this period Grunenthal suffered much pain and a dull pain continued up to the time of the trial. While Grunenthal is able to walk his movement is greatly impaired as he is unable to place any weight on the inner portion of his right foot. He is not totally disabled and the testimony of his expert witness indicates he can engage in "sedentary type work." Grunenthal said his efforts for permanent employment up to the time of the trial had been unavailing and he was then engaged in part time work as a custodian.

Grunenthal v. Long Island Railroad Co., 388 F. 2d 480, 484 (2d Cir. 1968), *reversed,* 393 U.S. 156 (1968).

It is clear in the present case that the Eleventh Circuit cited practically no factual basis upon which to grant a remittitur, certainly substantially less evidence than the Supreme Court found insufficient in *Grunenthal.* In fact, the only discussion as to why the damages were excessive was references to Kemper's arguments that the award was too high and that Kemper should not be responsible for the full amount. Simply citing arguments without

substantial evidence certainly does not fulfill the abuse of discretion standard which is required by a court of appeals to overturn the trial court's denial of a motion for remittitur.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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